No. _____

Supreme Court, U.S.
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In The Supreme Court of the United States

H. Leon Merritt,
Petitioner,
v.
United States of America
Respondent.
and
Steven Meyers; Kenneth Dorner,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

1) Does the United States Court of Appeals For the Fourth Circuit have the right to ignore the teachings of Gutierrez De Martinez v. Lamagno, 115 S.CT.2227, 515 U.S. 417, 132L.Ed.2d 375 (1995)

2) Does the United States Court of Appeals For the Fourth Circuit have the right to issue unpublished opinions that for the most part affirm the Lower Courts decision

3) Does the United States Court of Appeals For the Fourth Circuit have the right to publish written opinions that for the most part affirm the Lower Courts decisions

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are set forth in the caption.

CORPORATE DISCLOSURE STATEMENT WITH RESPECT TO THE PETITIONER

The Petitioner is not aware of any corporation(s) involved in this case.

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A. The United States Court of Appeals for the Fourth Circuit has in effect over ruled Gutierrez De Martinez v. Lamagno 115 U.S. Ct. 2227, 515 U.S. 417, 1322 L.Ed. 375

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Statutes

The statute involved in this case is 28 USC 2671 et seq and 28 U.S.C. 2401.

H. Leon Merritt respectfully prays that a Writ of Certiorari issue to review the Judgment of the Fourth Circuit court of Appeals in its unpublished opinion of Merritt v. U.S. Patent # 04-2003 and as well review the Fourth Circuits decision i - Guttierrez de Martinez v. Drug Enforcement Admin. 111 F3d 1148 (4th Cir (Va) 1997)

OPINIONS BELOW

1. The Entry of Order dated June 14, 2004. App. 20.
2. The Entry of Judgment dated June 16, 2004. App. 22.
3. The unpublished Opinion issued by the 4th Cir. Ct. of App. App. 24.

JURISDICTION

Jurisdiction of The United States Supreme Court is founded on 28, U.S.C. 1254, 28 U.S.C. 1651 and 28 U.S.C. 2350.

STATEMENT OF THE CASE

H. LEON MERRITT filed a Motion for Judgment in the Circuit Court for Arlington County, Virginia. The United States of America filed a Notice of Removal to the Eastern District of Virginia Alexandria Division. App. @ 1. It also filed a Notice of Substitution and a Certificate of Scope of Employment. App. @ 4 and 7. In the certificate the government failed to provide any

reason why Meyers and Dorner, Defendants, were acting within the course and scope of their employment. See App. 7. The United States subsequently filed a Motion to Dismiss requesting an order dismissing all claims for want of subject matter jurisdiction. Mr. Merritt filed Motion for Limited and Reasonable Discovery on June 14th, 2004. App. @ 9. Mr. Merritt also filed two affidavits, which supported his opposition to the government's Motion to Dismiss. Both affidavits support Mr. Merritt's claim that Mr. Meyers was not acting in accordance with his scope of employment. App. 13. The United States District Court Judge Gerald Bruce Lee issued an order on June 14, 2004 denying Plaintiff's request for limited and reasonable discovery, and further ordered that the United States' Motion to Dismiss is granted. App. @ 20. On June 16, 2004, he issued a judgment in favor of Defendants Meyers and Dorner, and the United States of America against Plaintiff H. Leon Merritt, in which he stated "this case is hereby dismissed". App. @ 22. Mr. Merritt appealed to the 4th circuit court of appeals. In an unpublished opinion the 4th Circuit affirmed the lower court's ruling in this case. App. @ 24. the clerk of the 4th

Circuit Court certified the unpublished opinion. App. @ 27.

REASONS FOR GRANTING THE PETITION in *Gutierrez De Martinez v. Lamagno* 115 S. Ct. 2227, 515 U.S. 417, 132 L. Ed. 2nd 375 (1995) decided on June 14, 1995, the Supreme Court issued its ruling. For a host of reasons the least of which was stated as, "The judgment of the United States Court of Appeals for the 4th Circuit is reversed and the case is remanded for proceedings consistent with this opinion".

The 4th Circuit substantially ignored or disregarded the findings found in *Gutierrez de Martinez v. Lamagno* 115 S. Ct. 2227, 515 U.S. 417 132 L.Ed.2nd 375 (1995). The 4th Circuit continues to ignore the findings of the Supreme Court, id at 2227, 417, 375. Since 1997, when the 4th Circuit issued its decision in *Gutierrez de Martinez v. Drug Enforcement Admin.* 111 F.3d 1148 (4th Cir. (Va.) (1997) there have been three other cases on point in which the 4th Circuit provided written opinions. There have been seven (7) cases in which the 4th Circuit affirmed the lower court's ruling with "unpublished" opinions. Further, there are lower court cases, have mirrored the decision of the 4th

Circuit in *Gutierrez de Martinez v Drug Enforcement Admin.* F.3d 1148. Most of the lower courts have mirrored the teachings of *Gutierrez de Martinez v. Drug Enforcement Admin.*

In the case of Merritt v. U.S., the lower court denied Merritt's Motion for Limited and Reasonable Discovery. It refused to grant a de novo hearing and it dismissed for want of subject matter jurisdiction--all counts without any explanation. In order to preserve the integrity of the Supreme Court's decision in *Gutierrez de Martinez v. Lamagno*, this case needs to have Certiori granted. The 4th Circuit Court of Appeals needs to be reversed, once again.

INTRODUCTION

The United States Supreme Court, *in Gutierrez de Martinez v. Lamagno* 115 S.Ct. 2227, 515 U.S. 417, 132 L.Ed.2d 375 (1995), provided written opinions on numerous issues disclosed in the case before it. The case involved a United States Attorney certifying that agent was acting within scope of his employment at time of an accident. Plaintiffs sought judicial review of Attorney General's Scope of Employment certification. This case was before the court because District Court Judge Claude M. Hilton held

certification unreviewable, substituted the United States for agent, and dismissed suit since claims arose abroad, and thus fell within exception to waiver of sovereign immunity continued in the Federal Tort Claims Act (FTCA). The Court of Appeals for the Fourth Circuit, 23 F.3d 402, affirmed the Lower Court's rulings, and plaintiffs petitioned for certiorari. The Supreme Court granted Certiorari. After its decision in *Gutierrez de Martinez v. Lamagno* 115 S.Ct. 2227 (1995). The Supreme Court remanded the case to the 4th Circuit. The 4th Circuit appears to have passed the Supreme Court's decision to trial judge Claude M. Hilton, Judge of the Eastern District Courts Alexandria Division of the U.S. District Court of Virginia. Whereupon Judge Hilton denied request for discovery, upheld the scope-of-employment certification, substituted United States as a party, and once again dismissed the action. Plaintiff appealed to the 4th Circuit. The case then became known as *Gutierrez de Martinez v. Drug Enforcement Admin.* 111 F.3d 1148 (4th Cir. (Va.) 1997)).

At this point a very peculiar thing happened at the 4th Circuit Court of Appeals. Within two days, two cases were argued. *Gutierrez de Martinez v. Drug Enforcement Administration* was argued on January 29, 1997. In that case, Judge Hilton was the trial judge. On January 27th, 1997,

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Maron v. U.S. 126 F.3d 317 (4th Cir. (Md) (1997)) was argued. In *Maron*, Judge Hilton was part of a three-judge panel. As part of the three-judge panel, J. Hilton required that the Plaintiff had the burden of proof to establish by a preponderance of evidence that the employees were not within the scope of their employment. Maron having failed to provide proof, the 4th Circuit affirmed all of the Lower Courts conclusions substituted the United States and affirmed dismissal of the action. It is apparent that Judge Hilton should have recused himself from participation in *Maron*. The three-judge panel, including Judge Hilton, ignored the teachings of *Gutierrez de Martinez v. Lamagno* 115 S.Ct. 2232 (1995).

Comparison of

Gutierrez de Martinez v. Lamagno 115 S.Ct. 2227, 515 U.S. 417, 132 L.Ed.2d 375 (1995) to

Gutierrez de Martinez v. Drug Enforcement Administration 111 F 3d 1148 (4th Cir (Va) 1997)

1. In response, the local United States Attorney, acting pursuant to the Westfall Act certified on behalf of the Attorney General that Lamagno was acting within the scope of his employment at the time of the accident. The certification, as is customary, stated no reasons for the U.S.

Attorney's scope of employment determination [emphasis added]. Id. at 2230. Comment: Most U.S. Attorneys' scope of employment determinations within the 4th Circuit contain no reasons for the determination. *See* Merritt's Appendix at 7

2. The Circuits divide sharply on this issue. Parting from the Fourth Circuit, most of the Courts of appeals have held certification by the Attorney General or her delegate amenable to court review. Id. at 2230.

3. First, the Attorney General herself urges review, mindful that in cases of the kind petitioners present, the incentive of her delegate to certify is marked. Second, when a government official's determination of a fact or circumstance--for example, "scope of employment"--is dispositive of a court controversy, federal courts generally do not hold the determination unreviewable. Instead, federal judges traditionally proceed from the "strong presumption that Congress intends judicial review." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 2136, 90 L.Ed.2d 623 (1986); see id., at 670-673, 106 S.Ct., at 2135-37; *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). Id at 2231.

4. Accordingly, we have stated time and again that judicial review of executive action "will not be cut off unless there is

a persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories*, 387 U.S. at 140, 87 S.Ct. at 1511. No persuasive reason for restricting access to judicial review is discernible from the statutory fog we confront here. Id at 2231.

5. In *Westfall*, we held that, to gain immunity from suit for a common-law tort, a federal employee would have to show that he was acting within the scope of his employment, *Westfall v. Erwin*, 484 U.S. 298, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988). (emphasis added) Id at 2232.

Comment: Compare to *Gutierrez v. D.E.A.* Para 2. Also see Paras. 3 and 4 where it specifies review is for clear error. See further Paras. 5 in *Lamagno*, which should be compared to (Gutierrez v. D.E.A.) Paras. 5, 7, 8, 10, 11, 12, and 13. The Paras. cited above shift the responsibility to support the scope of employment from the Federal employee to the Plaintiff. This is not in conformity with Westfall v. Erwin. Id at 299,108, S. Ct. at 585 Most of the time the Plaintiff in the 4th Circuit has been provided with no reasons for the scope of employment decision. The reason the Plaintiff should not be required to go first in the order of proof. The federal employees should be required to support the scope of employment issues with facts that disclose why they should be found within the scope they claim.

6. But nothing tied to the purpose of the legislation shows that Congress meant the Westfall Act to commit the critical "scope-of-employment" inquiry to the unreviewable judgment of the Attorney General or her delegate, and thus to alter fundamentally the answer to the "who decides" question. Id at 2232.

7. Inevitably, the United States Attorney will feel a strong tug to certify, even when the merits are cloudy, and thereby "do a favor", *post*, at 2243, both for the employee and for the United States as well, at a cost borne solely, and perhaps quite unfairly, by the plaintiff. Id at 2233.

8. Recognizing that a United States Attorney, in cases of this order, is hardly positioned to act impartially, the Attorney General reads the law to allow judicial review. Id at 2233.

9. In sum, under Lamagno's reading of the congressional product at issue, whenever the case falls within an exception to the FTCA, the Attorney General sits as an unreviewable "judge in her own cause"; she can block petitioner's way to a tort action in court, at no cost to the federal treasury, while avoiding litigation in which the United States has no incentive to engage, and incidentally enhancing the morale--or at least sparing the purse--of federal employees. The United States, as we have noted, disavows this extraordinary,

conspicuously self-serving interpretation. See *supra*, at 2231, and n.4. Recognizing that a United States Attorney, in cases of this order, is hardly positioned to act impartially, the Attorney General reads the law to allow judicial review. Id at 2233.

Comment: There are a number of paragraphs within *Gutierrez v. D.E.A.* that state the proposition that discovery decisions are within the trial court's discretion. See Paras. 7 through 13 The undersigned believes that the Supreme Court needs to provide a definition for the courts discretion or at least tighten up the trial court's scope of discretion.

10. If Congress made the Attorney General's delegate sole judge, despite the apparent conflict of interest, then Congress correspondingly assigned to the federal court only rubber-stamp work. Upon certification in a case such as this one, the United States would automatically become the defendant and, just as automatically, the case would be dismissed. The key question presented--scope of employment--however contestable in fact, would receive no judicial audience. The court could do no more, and no less, than convert the executive's scarcely disinterested decision into a court judgment. This strange course becomes all the more surreal when one adds to the scene the absence of an obligation on the part of the Attorney General's delegate to conduct a fair

proceeding, indeed, any proceeding. She need not give the plaintiff an opportunity to speak to the "scope" question, or even notice that she is considering the question. Nor need she give any explanation for her action. Id at 2234.

11. The certification, removal, and substitution provisions of the Westfall Act, 28 U.S.C. 2679 (d)(1)-(3), work together to assure that, when the scope of employment is in controversy, that matter, key to the application of the FTCA, may be resolved in federal court. To that end, the Act specifically allows employees whose certification requests have been denied by the Attorney General, to contest the denial in court 2679 (d)(3)). Id at 2234-35.

12. The statute next instructs that the "certification of the Attorney General shall conclusively establish scope of office or employment *for purposes of removal*." *Ibid.* (emphasis added). Id at 2235.

13. Next, Congress made the Attorney General's certificate conclusive solely for purposes of removal, and notably not for purposes of substitution. Id at 2235. Comment: For purposes of substitution the Attorney General should be required to provide <u>details</u> of why s/he believe that the employee(s) are in compliance with their scope of employment.

14. Because the statute is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review and that mechanical judgments are not the kind federal courts are set up to render. Under our reading, the Attorney General's certification that a federal employee was acting within the scope of his employment--a certification the executive official, in cases of the kind at issue, has a compelling interest to grant--does not conclusively establish as correct the substitution of the United States as defendant in place of the employee. Id at 2236. Comment: in *Merritt v. USA* there were no details provided in the scope of employment certificate nor was discovery allowed and no hearing de novo was allowed. App @ 7

15. If, in preserving judicial review of scope-of-employment certifications, Congress "approach[ed] the limit" of federal court jurisdiction, see *post*, at 2239--and we do not believe it did--we find that exercise of federal court authority involved here less ominous than the consequences of declaring certifications of the kind at issue uncontestable: The local United States Attorney, whose conflict of interest is apparent, would be authorized to make final and binding decisions insulating both the United States and federal employees like

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Lamagno from liability while depriving plaintiffs of potentially meritorious tort claims. The Attorney General, having weighed the competing considerations, does not read the statute to confer on her such extraordinary authority. Nor should we assume that Congress meant federal courts to accept cases only to stamp them "Dismissed" on an interested executive official's unchallengeable representation. The statute is fairly construed to allow petitioners to present to the District Court their objections to the Attorney General's scope-of-employment certification, and we hold that construction the more persuasive one [emphasis added]. Id at 2237.

16. For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for proceedings consistent with this opinion. Id at 2237.

COMPARE *GUTIERREZ DE MARTINEZ V. DRUG ENFORCEMENT ADMIN.* 111 F. 3 D 1148 (4TH CIR. (VA.) 1997) TO *GUTIERREZ DE MARTINEZ V. LAMAGNO* 115 S.CT. 2227 (1995).

1. "Because we conclude that the district court followed the correct review procedure and reached the right result, we affirm." Id at 1150-1151. (No explanation was given for this remark).

2. After considering the parties' briefs and numerous submissions, and after hearing argument by counsel for both parties, the district court ruled that additional discovery would not develop any facts material to the scope-of-employment question. The district court then upheld the scope-of-employment certification, again substituted the United States for Lamagno, and dismissed the action against the United States [emphasis added]. Id at 1152.

3. The fundamental question on appeal, then, is the propriety of the district court's conclusion on remand that Lamagno was acting within the scope of his employment at the time of the accident. Because we have not previously allowed the review of scope-of-employment certifications, it is necessary to determine the correct standards to apply. Both parties agree that the scope-of-employment question under the Westfall Act is one of law. Accordingly, we review the district court's ultimate resolution of the scope-of-employment question under a de novo standard. *See* fn.3 wherein it states: we review for clear error any factual findings upon which the legal scope-of-employment determination rests. Moreover, this is a separate question from the standard under which the certification itself is to be reviewed. (As discussed, (to) infra at pages 1154-57. Id at 1152.

4. Therefore, the district court may resolve disputed issues of fact in considering a challenge to a scope-of-employment certification. If the district court does resolve disputed issues of fact, we review these factual findings for clear error. *See Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995) (noting, in a Westfall Act case, that the court "review[s] the relevant district court's findings of disputed fact for clear error"); Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1993) (explaining that "[w]here facts relevant to [the scope-of-employment] inquiry are in dispute, ... we review the district court's factual findings for clear error") [emphasis added]. Id at 1153. Comment: Paragraphs 3 and 4 require that the scope of employment be examined for clear error. This substantially raises the bar regarding proof.

5. The Attorney General's certification is conclusive unless challenged. *See Billings*, 57 F.3d at 800. When the certification is challenged, it serves as prima facie evidence and shifts the burden to the plaintiff to prove, by a preponderance of the evidence, that the defendant federal employee was acting outside the scope of his employment. *See Palmer v. Flaggman*, 93 F.3d 196, 198-199 (5th Cir. 1996) (stating that "the burden of proof lies with the plaintiff to show that the Attorney General's initial decision was incorrect" (footnote omitted)) [emphasis added]. Id at 1153.

6. In assessing whether the plaintiff has rebutted the prima facie case, however, the district court should not defer to the Attorney General's certification, but should instead review the question de novo. See Palmer, 93 F.3d at 198-199 (stating that it gave "no judicial deference to the Attorney General's findings"); *Anthony v. Runyon*, 76 F. 3d 210, 213 (8th Cir. 1996) (stating that "the district court must independently review the case and determine whether the defendant was in fact acting within the scope of his or her employment"); see also *Kimbro v. Velten*, 30 F.3d at 1509 (D.C. Cir. 1994)(noting that the certification has no "particular evidentiary weight"); *Schrob v. Catterson*, 967 F.2d at 936 (3rd Cir. 1992) n. 13 (explaining that deference to the certification "is not justified, for the certification should be reviewed de novo by the district court"); *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir. 1991) (concluding, in asking "what level of deference the district court should afford the certification," that review of the certification is "de novo"); *Hamrick*, 931 F.2d at 1211 (holding that the district court should engage in a "de novo review to determine whether the certification was proper"); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1543 (11 Cir. 1990) (noting that "the Attorney General's scope certification does not warrant judicial deference."), *amended*

on other grounds, 924 F.2d 1555 (11th Cir. 1991); *Nasuti v. Scannell*, 906 F.2d 802, 813 (1st Cir. 1990) (holding that, for substitution purposes," the scope-of-employment question must "be independently resolved by the court"). Id at 1154. Comment: The string cite contained in Para. 6 discloses a de novo basis of review. It does not support the clear error standard recited in Paras. 3 and 4 infra.

7. Accordingly, in light of the recognized desirability of quickly resolving the scope-of-employment issue, we agree with those courts that have held that "the district court should ensure that both the discovery and [any evidentiary hearings] are circumscribed as narrowly as possible, although these are matters within its discretion." Id. at 1154-1155.

8. Only if the district court concludes that there is a genuine question of fact material to the scope-of-employment issue should the federal employee be burdened with discovery and an evidentiary hearing. In short, the scope-of-employment certification is prima facie evidence that the defendant federal employee acted within the scope of his employment, thereby placing the burden on the plaintiff to prove otherwise. If the plaintiff does not come forward with any evidence, the certification is conclusive. Moreover, the plaintiff's submission must be specific evidence or the forecast of specific evidence that contradicts the Attorney

General's certification decision, not mere conclusory allegations and speculation. If the plaintiff's evidence is sufficient to carry the burden of proof, the defendant federal employee or the government may come forward with evidence in support of the certification. At this point, the district court may permit (and limit) any needed discovery. Thereafter, the district court must determine whether there are any genuine issues of fact material to the scope-of-employment decision, and, if so, it may conduct an evidentiary hearing to resolve these factual issues. Once any factual issues are resolved, the district court should weigh the evidence on each side to determine whether the certification should stand. During this process, the district court should remain cognizant of the considerations weighing against protracted litigation under the Westfall Act. Id at 1155.

9 Appellants first argue that the district court should have allowed discovery and an evidentiary hearing before dismissing the action against Lamagno. In their view, additional discovery would have afforded them an opportunity to depose Lamagno and Bermann, thereby exposing possible inconsistencies in their stories. They do not point, however, to any specific evidence that could be uncovered by further discovery beyond the speculative possibility of inconsistency. Id at 1155.

10. We review the district court's discovery decisions for abuse of discretion. *See Jamison v. Wiley*, 14 F.3d 222, 236 (4th Cir.1994) (holding that "the district court did not abuse its discretion in holding an evidentiary hearing on the scope-of-employment issue"); *Schorb v. Catterson*, 967 F.2d 929, 936 (3d Cir.1992) (noting, in an action under the Westfall Act, that pretrial discovery decisions "are matters within [the trial courts] discretion"). Under this standard, we affirm the district court's refusal to allow additional discovery and an evidentiary hearing. *See Anthony v. Runyon*, 76 F.3d 210, 214 (8th Cir.1996) Id at 1155.

11. ("Although we have indicated that it may be necessary for the court to conduct an evidentiary hearing to resolve the scope-of-employment issue, a hearing is not required in every case." (citations omitted)) [emphasis added]. Id at 1155.

12. When case plaintiffs present no specific evidence contradicting the scope-of-employment certification, discovery before dismissal is unnecessary. Id at 1156.

13. In conclusion, we hold that a scope-of-employment certification produced under the Westfall Act is prima facie evidence that the defendant federal employee acted within the scope of his employment, and that it places the burden on the plaintiff to prove otherwise. Appellant's allegations and

assumptions are no basis upon which to set aside the scope-of-employment certification, and the district court did not err in denying Appellants' request for additional discovery and an evidentiary hearing. Accordingly, we affirm the district court's conclusion that Lamagno was acting within the scope of his employment when the accident occurred. The motion to substitute the United States for Lamagno was properly granted. Id at 1159. Comment: The effect of this ruling was that the case was dismissed.

The 4th Circuit Court of Appeals affirmed the lower court's decisions in the following cases with unpublished opinions.

1) *Dachman* v. *U.S.*, 155 F.3d 558, 558 (4th Cir. (Md.) 1998).

2) *Doyle-Penre* v. *Muhammad,* 229 F.3d 1142, 1142 (4th Cir. (Va.) 2000)

3) *Epley* v. *West,* 168 F.3d 481, 481 (4th Cir. (N.C.) 1998)

4) *Goodwyn* v. *Simons,* 90 Fed. Appx. 680, 2004 WL 332826 (4th Cir.(Va)).

5) *Hoffman* v. *U.S.*, 182 F.3d 907, 907 (4th Cir. (N.C.) 1999)

6) *Merritt* v. *U.S.A. and Meyers and Dorner,* (4th Cir (Va.) Docket No. 04-2003)

7) *Vogrin* v. *U.S.*, 141 F.3d 1162, 1162 (4th Cir. (W.Va.) 1998)

The 4th Circuit Court of Appeals affirmed the lower court's decisions in the following cases with published opinions.

1. *Borneman v. U.S.*, 213 F.3d 819 (4th Cir. (E.D.N.C.) 2000)
2. *Goldstein v. Moatz*, 364 F.3d 205 (4th Cir. (Va.) 2004)
3. *Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3rd 1148, 1154 (4th Cir.(Va.) 1997)
4. *Maron v. U.S.*, 126 F.3d 317 (4th Cir. (Md.) 1997)

Comments

In all four cases, the 4th Circuit used words that had the effect of the following: The scope-of-employment certification is conclusive unless challenged and is prima facie evidence that defendant federal employee acted within the scope of his employment. This shifts burden to Plaintiff who must prove by a preponderance of evidence that the federal employee was acting outside the scope of his employment. *In Gutierrez de Martinez v. D.E.A.* 111 F.3d 1142, 1155, we review the district courts discovery decision for abuse of discretion (holding that "this district court did not abuse its discretion in holding an evidentiary hearing on

scope-of-employment issue") (noting in an action under the Westfall Act, that pretrial discovery decisions "are matters within [the trial courts'] discretion"). Under this standard we affirm the district courts' refusal to allow additional discovery and an evidentiary hearing. *Goldstein* 364 F.3d 205, 220. The 4th Circuit states, contrary to Goldstein's assertions, that he has no right to discovery on the certification issue. The assessment of whether discovery is appropriate on such an issue is within the sound discretion of the district court and any discovery that is authorized should be narrow and circumscribed. As we have explained, "the district court may allow [in its discretion] limited discovery or conduct an evidentiary hearing, but should not do so if the certification, the pleadings, the affidavits and any supporting documentary evidence do not reveal an issue of material fact". Gutierrez v. D.E.A. at 1155 In *Goldstein* there is no reference whatsoever to *Gutierrez de Martinez v. Lamagno*, 115 S.Ct. 2227 (1995). In *Maron* the 4th Circuit found: "we find Maron's arguments unpersuasive, and we affirm all of the Lower Court's conclusions". All the cases cited in *Maron* at 322 are not in conformance with, *Gutierrez de Martinez v. Lamagno*, 115 S.Ct. 2227 (1995).

Lower Court Cases Decided on the 4th Circuit

Brittingham v. U.S.	972 F supp. 1014 (ED. (Va) 1997)
Chin v. Wilhelm	291 F. Supp. 2d 400 (D. Md. 2003)
Curtis v. Praeht	202 F. Supp. 2d 406 (D. Md. 2002)
Deane v. Light	970 F. Supp. 465 (E.D. (Va) 1997)
Lee v. U.S.	171 F. Supp. 2d 566 (M.D. (Nc) 2001)
Webb v. U.S.	24 F. Supp. 2d 608 (W.D. (Va) 1998)
Wilson V. Jones	902 F. Supp. 673 (E.D. (Va) 1995)

All except two of the cases were affirmed and dismissed. The two cases that were not dismissed were: 1) Deane v. Light in which the government employer did not engage in the conduct alleged. 2) Wilson v. Jones in which the court allowed Plaintiff twenty days to submit verified evidence that Defendant was acting out side the scope of his employment.

The above comparison should provide the Supreme Court what it needs to reverse once again the 4th Circuit. The Supreme Court needs to make it clear that the 4th Circuit has had the last bite of the apple on this issue.

CONCLUSION

The 4th Circuit Court of Appeals had ignored the teachings of Gutierrez de Martinez v. Lamagno. It has obscured and in a sense overruled Gutierrez de Martinez v. Lamagno. The decisions the 4th Circuit made in Gutierrez de Martinez v. Drug Enforcement Admin. 111 F3d 1148 (4th Cir. (Va) 1997) have in a sense rewritten Gutierrez de Martinez v. Lamagno. The Supreme Court has compelling reasons to grant Writ of Certiorari in this case.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

H. LEON MERRITT	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04-442-A
	)	Formerly Case No. 04-215
	)	Hon. Gerald B. Lee
STEVEN MEYERS	)	
	)	
Defendant.	)	

NOTICE OF REMOVAL

To: Clerk of the Circuit Court
Arlington County Circuit Court
1425 North Courthouse Road
Arlington, Virginia 22201
Bernard R. Corbett, Esq.
123 South Royal Street
Alexandria, Virginia 22314

The United States of America, by and through its undersigned attorneys, respectfully represents:

1. That it is the employer of Steven Meyers and Kenneth Dorner, Defendants in the above-captioned civil action now pending in the Circuit Court of Arlington County, Virginia at all relevant times and that no trial has yet been had therein. A copy of the Motion for Judgment was received by the Defendants and is attached hereto. This constitutes all process, pleadings, and orders received by named Defendants in this action. See 28 U.S.C. § 1446 (a).

2. The instant removal is brought pursuant to 28 U.S.C. §§ 1446, 2679. The State court action commenced against the named Defendants is predicated upon acts allegedly performed by them within the course and scope of their employment with the United States Patent and Trademark Office.

3. Plaintiff, H. Leon Merritt alleges defamation and other torts against defendants. Whatever actions, if any, taken by Meyers and Dorner were taken within the official

performance of their Federal duties. Therefore, the action lies solely against the United States of America as a matter of Federal law. 28 U.S.C. § 2679.

4. Attached hereto is a certification by the United States Attorney for the Eastern District of Virginia verifying that at the time of the alleged incident, Steven Meyers and Kenneth Dorner, were acting within the course and scope of their official duties.

5. A copy of this Notice of Removal is being filed with the Clerk of the State Court pursuant to Title 28 U.S.C. § 1446(d).

Respectfully submitted,

Paul J. McNulty
United States Attorney
By Counsel
By: _____
Jon K. Turner
Special Assistant United States Attorney
Appearing Per 28 U.S.C. § 517
2100 Jamieson Avenue
Alexandria, Virginia 22314
Telephone: 703-299-3700

App. 4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

H. LEON MERRITT	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04-442-A
	)	Formerly Case No. 04-215
	)	Circuit Court for Arlington
	)	County, Virginia
STEVEN MEYERS	)	
	)	
Defendant.	)	

NOTICE OF SUBSTITUTION

The United States, by and through its undersigned counsel, is hereby substituted as the proper party defendant for Steven Meyers and Kenneth Dorner. See 28 U.S.C.

§ 2679(d)(2). The above caption shall be used in any future court documents.

Plaintiff, H. Leon Merritt alleges defamation and other torts against defendants. Whatever actions, if any, were taken by Meyers and Dorner within the official performance of their Federal duties. The exclusive remedy for claims of damage resulting from the actions of a federal employee when acting within the course and scope of his office or employment lies in an action against the United States of American under the Federal Tort Claims Act. See 28 U.S.C. § 2671, 2679.

Upon certification by the Attorney General or his designee that the individual federal defendant was acting within the scope of his employment, the action is deemed one against the United States under the Federal Tort Claims Act. See 28 U.S.C. § 2679(d)(2). In the instant case, Paul J. McNulty, United States Attorney for the Eastern District of Virginia, has certified that Defendants, Steven Meyers and Kenneth Dorner were acting within the scope and course of their employment at all times relevant to the Plaintiff's claims. See Defendant's Exhibit A (attached hereto). Consequently, Steven Meyers and Kenneth Dorner must be dismissed as defendants in this action and the United States substituted as the sole defendant. 28 U.S.C.§ 2679(d)(2).

Respectfully submitted,

Paul J. McNulty

United States Attorney

By Counsel

By: _____

Jon K. Turner

Special Assistant United States Attorney

Appearing Per 28 U.S.C. § 517

2100 Jamieson Avenue

Alexandria, Virginia 22314

Telephone: 703-299-3700

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

H. LEON MERRITT	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04-442-A
	)	Formerly Case No. 04-215
	)	Circuit Court for Arlington
	)	County, Virginia
STEVEN MEYERS	)	
	)	
Defendant.	)	

CERTIFICATE OF SCOPE OF EMPLOYMENT

I, Paul J. McNulty, United States Attorney for the Eastern District of Virginia, pursuant to Title 28, Code of

Federal Regulations, Part 15.3(2), hereby certify that I have caused an investigation to be made into the circumstances of the incident upon which is based the plaintiff's claim against Steven Meyers and Kenneth Dorner. Based upon the results of that investigation I hereby certify that Steven Meyers and Kenneth Dorner, Defendants, were acting within the course and scope of their employment as employees of the United States of America at the time of the incident out of which the above-entitled action arose.

_____

Paul J. McNulty
United States Attorney

Dated: 4/14/04

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

H. LEON MERRITT	)	
	)	
Plaintiff,	)	
	)	
v	)	Civil Action No. 04-442-A
	)	
	)	Hon. Gerald B. Lee
STEVEN MEYERS	)	
	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF PLAINTIFF'S MOTION FOR LIMITED AND REASONABLE DISCOVERY

Plaintiff requests that this Court grant him limited and reasonable discovery for the purpose of deciding whether to contest the determination of the

U.S. Attorney for this District's finding that Meyers and Dorner were acting within the scope of their federal employment at the time of the incidents giving rise to this action.

Plaintiff wishes to discover the following:

With regard to Defendant Meyers:

1. Plaintiff wishes to discover evidence of any investigation conducted by the government prior to its determination that Meyers was acting within the scope of his federal employment at the time of the incidents giving rise to this Action.

2. Plaintiff requests that the Government disclose the job description that describes the duties of Meyers at the U.S. Patent and Trademark Office since January 1, 2003.

3. Plaintiff requests that the Government disclose what it was relying on within the job descriptions of Meyers to make a determination that Meyers was performing duties within the scope of his federal job description when he took the actions that are complained about in Count 1 of the Complaint.

4. Plaintiff requests that the Government disclose what it was relying on within the job descriptions of Meyers to make a determination that Meyers was performing duties within the scope of his federal job

description when he took the actions that are complained about in Count II of the Complaint.

With regard to Dorner:

1. Plaintiff wishes to discover evidence of any investigation conducted by the Government prior to its determination that Dorner was acting within the scope of his federal employment at the time of the incidents giving rise to this Action.

2. Plaintiff requests that the government disclose the job description that describes the duties of Dorner at the U.S. Patent and Trademark Office since January 1, 2003.

3. Plaintiff requests that the Government disclose what it was relying on within the job descriptions of Dorner to make a determination that Dorner was performing duties within the scope of his federal job description when he took the actions that are complained about in Count I of the Complaint.

With regard to Meyers and Dorner:

1. Plaintiff requests that the Government produce all documents relied on or referred to when making its response to the above requests. This is to include, but is not limited to written or recorded statements made by Meyers or Dorner or any witnesses.

Respectfully submitted,

H. LEON MERRITT,

Plaintiff

By Counsel

LAW OFFICE OF BERNARD R. CORBETT

By: _____

Bernard R. Corbett, Esquire

VA Bar No. 023022

123 South Royal Street

Alexandria, Virginia 22314

Tel. (703) 549-4700

Fax (703) 549-5290

Counsel for Plaintiff

IN THE UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

H. LEON MERRITT	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 04-442-A
	:	
UNITED STATES OF AMERICA	:	
	:	
Defendant.	:	

AFFIDAVIT OF NATHANYA FERGUSON

I am over the age of twenty-one and competent to testify in this matter. The statements I made herein are based on my personal knowledge.

1. On or about April 1, 2003, I saw Steven Meyers walk into the office which at that time I shared with Mr. Hubert Merritt.

2. Mr. Meyers walked over to Mr. Merritt's desk and put his hand over Mr. Merritt's desk.

3. Mr. Meyers had his back to me. I was unable to determine whether he picked up any pictures from Mr. Merritt's desk.

4. However, Mr. Meyers loudly proclaimed to Mr. Merritt, "Are you looking at child pornography?"

5. Mr. Meyers was referring to pictures of Mr. Merritt's granddaughters enjoying a birthday party.

6. I know this because Mr. Merritt, shortly before Mr. Meyers came into the office, was showing me the pictures of his granddaughters. The pictures were of fully cloth children, they did not contain any nudity of obscene material. The pictures were of happy, beautiful children in a family setting.

7. I stated to Mr. Merritt, that in addition to being saddened by the comments made by Mr. Meyer, I was uncomfortable and in disbelief that Mr. Meyers could make such an inappropriate statement in a workplace setting where other contract employees or USPTO employees could hear.

8. The loud comments by Mr. Meyers could be very easily heard by numerous contract employees, and USPTO employees that walked by the office shared by Mr. Merritt and me.

9. I characterize Mr. Merritt as a proud grandfather. Mr. Merritt has always enjoyed sharing news and pictures about his lovely granddaughters.

10. It is unfortunate that shortly after the incident with Mr. Meyers, Mr. Merritt removed all pictures of his grand-children from his work area.

11. At no time did Mr. Meyers ever say anything in my presence that remotely sounded like "Remove potentially offensive items from this work place" or any words to that effect.

I DO SOLEMNLY SWEAR UNDER THE PENALTY OF PERJURY THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

_____

Nathanya Ferguson

IN THE UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

H. LEON MERRITT	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 04-442-A
	:	
UNITED STATES OF AMERICA	:	
	:	
Defendant.	:	

AFFIDAVIT OF H. LEON MERRITT

I am over the age of twenty-one and competent to testify in this matter. The statements I made herein are based on my personal knowledge.

1. On or about April 1, 2003, I saw Steven Meyers walk into my office which at that time I shared with Ms. Nathanya Furguson.

2. Mr. Meyers walked over to my desk, picked up pictures of my grandchildren, then tossed them on my desk.

3. Mr. Meyers loudly proclaimed to me "What is this, more of your child pornography?"

4. Mr. Meyers was referring to pictures of my granddaughters enjoying a birthday party.

5. Shortly before Mr. Meyers came into my office, I was showing the pictures of my granddaughters to Ms. Furguson. The pictures were of my fully cloth grandchildren, they did not contain any nudity of obscene material. The pictures were of my happy, beautiful grandchildren in a family setting.

6. I was appalled at Mr. Meyers saying what he said so loudly that not only Ms. Furguson heard him, but anyone walking thru the hallway could have heard him.

7. The loud comments by Mr. Meyers could be very easily heard by numerous contract employees, and USPTO employees that walked by the office shared by Ms. Furguson and me.

8. I am a proud grandfather. I have always enjoyed sharing news and pictures about my lovely granddaughters with my co-workers and they share theirs with me.

9. Not wishing to be subjected to such distasteful comments by Mr. Meyers again, I removed all pictures of my grandchildren from my work area.

10. At no time did Mr. Meyers ever say anything in my presence that remotely sounded like "Remove potentially offensive items from this work place" or any words that conveyed such a message in anyway.

I DO SOLEMNLY SWEAR UNDER THE PENALTY OF PERJURY THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

_____

H. Leon Merritt

State of Maryland :

City of Annapolis : *To Wit,*

Subscribed and sworn to before me this 7th day of May, 2004.

Susan M. Blake

_____

Notary Public

My Commission Expires: August 9, 2006

Commonwealth of Virginia :

City of Alexandria : *To Wit,*

Subscribed and sworn to before me this 5th day of May, 2004.

_____

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

H. LEON MERRITT,	]	
	]	
Plaintiff,	]	
	]	
v.	]	Case No. 1:04cv442
	]	
STEVEN MEYERS, et al	]	
	]	
Defendants.	]	

ORDER

THIS MATTER is before the Court on Plaintiff Merritt's Motion for Limited and Reasonable Discovery and the United States' Motion to Dismiss. For the reasons stated in open court on June 4, 2004, it is hereby

ORDERED that Plaintiff's Motion for Limited and Reasonable Discovery is DENIED. It is further

ORDERED that the United States' Motion to Dismiss is GRANTED.

The Clerk is directed to forward a copy of this Order to Counsel.

Entered this 14th day of June, 2004.

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
06/14/04

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

H. LEON MERRITT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:04cv442
	)	
	)	
STEVEN MEYERS, et al	)	
	)	
Defendants.	)	

JUDGMENT

Pursuant to this Court's order dated June 14, 2004, wherein the Court granted the United States' Motion to Dismiss, the Court hereby

ORDERS the Clerk to enter JUDGMENT in favor of the Defendants Steven Meyers, Kenneth Dorner, and the United States of America and against Plaintiff H. Leon Merritt, pursuant to Rule 58(a) of the

Federal Rules of Civil Procedure. This case is hereby DISMISSED.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 16th day of June, 2004.

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
06/16/04

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-2003

H. LEON MERRITT,

Plaintiff - Appellant,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee,

and

STEVEN MEYERS; KENNETH DORNER,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (CA-04-442-1)

Submitted: February 25, 2005 Decided: March 16, 2005

Before WILKINSON, MOTZ, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Bernard R. Corbett, LAW OFFICE OF BERNARD R. CORBETT, Alexandria, Virginia, for Appellant. Paul J. McNulty, United States Attorney,

---

Dennis C. Barghaan, Jr., Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

H. Leon Merritt appeals the district court's orders dismissing his tort case and denying reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See Merritt v. United States, No. CA-04-442-1 (E.D.Va. filed June 16 and entered June 18, 2004; filed July 16 and entered July 19, 2004). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

2

FILED
OCT 24 2005

No. 04-1675

In The
Supreme Court of the United States

H. Leon Merritt,
Petitioner,
v.
United States of America
Respondent.
and
Steven Meyers; Kenneth Dorner,
Respondents.

U. S. S. C. RULE 44 PETITION FOR REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Bernard R. Corbett
LAW OFFICE OF BERNARD R. CORBETT
123 S. Royal St.
Alexandria, VA 22314
(703) 549-4700

Counsel for Petitioner

QUESTION PRESENTED

1) Does the United States Court of Appeals For the Fourth Circuit have the right to ignore the teachings of *Gutierrez De Martinez v. Lamagno*, 115 S.CT.2227, 515 U.S. 417, 132L.Ed.2d 375 (1995)

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are set forth in the caption.

CORPORATE DISCLOSURE STATEMENT WITH RESPECT TO THE PETITIONER

The Petitioner is not aware of any corporation(s) involved in this case.

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A. The United States Court of Appeals for the Fourth Circuit has in effect over ruled *Gutierrez De Martinez v. Lamagno* 115 U.S. Ct. 2227, 515 U.S. 417, 1322 L.Ed. 375

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Certificate of Compliance with U.S.S.C. Rule 44

End

TABLE OF AUTHORITIES

Cases **Page(s)**

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Curtis v. Pracht 202 F Supp. 2d 406 (D. Md. 2002) 9,
Dachman v. U.S. 155 F. 3d 558, 558
(4th Cir.(Md) 1998) 6,
Deane v. Light 970 F. Supp. 465 (E.D.Va 1997) 9,
Doyle - Penre v. Muhammad 229 F 3d 1142, 1142
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Epley v. West 168 F 3d 481, 481 (4th Cir. (N.C.) 1998) 6,
Goldstein v. Moatz 364 F. 3d 205
(4th Cir. (E.D. Va) 2004) 7,8,
Goodwyn v. Simons 90 Fed. Appx.680

(4th Cir. (Va) 2004) 6,
Gutierrez De Martinez v. Drug Enforcement Admin. 111 F. 3d 1148 (4th Cir (Va) 1997) 1, 4, 7, 8, 10,
Gutierrez De Martinez v. Lamagno (115 S. Ct. 2227, 515 U.S. 417), 132 L. Ed 2d (1995) 3, 4, 5, 9, 10
Hoffman v. U.S. 182 F 3d 907, 907 (4th Cir (N.C.) 1999) 6,
Lee v. U.S. 171 F. Supp. 2d 566 (M.D. N.C. 2001) 9,
Maron v. U.S. 126 F. 3d 317 (4th Cir (Md) 1997) 7, 8, 9,
Merritt v. U.S. Docket # 04-2003 (4th Cir. (Va) 2005) 4, 6,
Vogrin v. U.S. 141 F 3d 1162 (4th Cir. (W.Va) 1998) 6,
Webb v. U.S. 24 F. Supp. 2d 608 (W.D.Va. 1998) 9,
Wilson v. Jones 902 F.Supp. 673 (E.D.Va.1995) 9,

Statutes

The statute involved in this case are 28 USC 2671 et. seq. and 28 USC 2401.

H. Leon Merritt on a U.S. Supreme Court Rule 44 Petition for Rehearing, respectfully prays that a Writ of Certiorari issue to review the Judgment of the Fourth Circuit Court of Appeals in its unpublished opinion of *Merritt v. U.S.* No. 04-2003. We further request that the Court review the Fourth Circuit's decision in - *Gutierrez De Martinez v. Drug Enforcement Admin.* 111 F3d 1148 [4th Cir [Va] 1997]

OPINIONS BELOW

1. The Entry of Order dated June 14, 2004. App.
2. The Entry of Judgment dated June 16, 2004. App. 5
3. U.S. Court of Appeals for the 4th Circuit issued an order in which it affirmed by unpublished per curiam opinion. In the case of *H. Leon Merritt, Appelant vs. United States of America, Appelee, and Steve Meyers and Kenneth Dorner, Defendants.* The decision was decided on March 16, 2005. [App.1] The petition for Writ of Certiori was filed in a timely manner.

JURISDICTION

Jurisdiction of The United States Supreme Court is founded on 28 USC 1254, 28 USC 1651 and 28 USC 2350.

STATEMENT OF THE CASE

H. LEON MERRITT filed a Motion for Judgment in the Circuit Court for Arlington County, Virginia. The United States of America filed a Notice of Removal to the U. S. D. C. - Eastern District of Virginia, Alexandria Division. App. 24 It also filed a Notice of Substitution and a Certificate of Scope of Employment. App. 21 and 19 In the Certificate of Scope of Employment the government failed to provide any reason(s) why Meyers and Dorner, Defendants, were acting within the course and scope of their employment. (emphasis added) App.19 The United States subsequently filed a Motion to Dismiss requesting an order dismissing all claims for want of subject matter jurisdiction. Mr. Merritt filed a Motion for Limited and Reasonable Discovery on June 14th, 2004. App. 15

Mr. Merritt also filed two affidavits, which supported his opposition to the government's Motion to Dismiss. App 9 paras. 4 to 9 and 11 and App. 12 paras. 2 to 8 and 10. Both affidavits support Mr. Merritt's claim that Mr. Meyers was not acting in accordance with his scope of employment. App. 9 and 12. The United States District Court Judge Gerald Bruce Lee issued an order on June 14, 2004 denying Plaintiff's request for limited and reasonable discovery, and further ordered that the United States' Motion to Dismiss is granted. App. 7 On June 16, 2004, he issued a judgment in favor of Defendants Meyers and Dorner, and the United States of America against Plaintiff H. Leon Merritt, in which he stated "this case is hereby dismissed". App. 5 Mr. Merritt appealed to the 4th Circuit Court of Appeals. In an unpublished opinion the 4th Circuit affirmed the lower court's ruling in this case. App. 1

REASONS FOR GRANTING THE PETITION

In *Gutierrez De Martinez v. Lamagno* 115 S. Ct. 2227, 515 U.S. 417, 132 L. Ed. 2nd 375 (1995) the

Supreme Court issued its ruling on June 14, 1995. For a host of reasons the least of which was stated as, "The judgment of the United States Court of Appeals for the 4th Circuit is reversed and the case is remanded for proceedings consistent with this opinion".

The 4th Circuit substantially ignored or disregarded the findings found in *Gutierrez De Martinez v. Lamagno* id. The 4th Circuit continues to ignore the findings of the Supreme Court, id at 2227, 417, 375. Since 1997, when the 4th Circuit issued its decision in *Gutierrez De Martinez v. Drug Enforcement Admin.* 111 F.3d 1148 (4th Cir. (Va.) (1997) there have been three other cases on point in which the 4th Circuit provided written opinions. There have been seven (7) cases in which the 4th Circuit affirmed the lower court's ruling with "unpublished" opinions. Further, there are lower court cases, which have mirrored the decision of the 4th Circuit in *Gutierrez De Martinez v Drug Enforcement Admin.* Id @ 1148. Most if not all of the District Courts in the 4th Circuit relied on the teachings of *Gutierrez De Martinez v. Drug Enforcement Admin.* id.

In the case of *Merritt v. U.S.* Docket # 04-2003 the lower court denied Merritt's Motion for Limited and Reasonable Discovery. It refused to grant a de novo hearing and dismissed the case on all counts without explanation. (emphasis added) In order to preserve the integrity of the Supreme Court's decision in *Gutierrez De Martinez v. Lamagno*, this case needs to have Certiori granted. The 4th Circuit Court of Appeals needs to be reversed, once again.

ARGUMENT

MORE THAN 10 YEARS HAVE PASSED SINCE THE U. S. SUPREME COURT ISSUED ITS RULING IN *GUTIERREZ DE MARTINEZ v LAMAGNO*, 115 S.CT. 2227, 515 U.S. 417, 132 L. Ed. 2d 375 (1995).

The 4th Circuit Court of Appeals has consistently ignored the teachings of *Gutierrez De Martinez v. Lamagno*, id. through out the ten year period.

The 4th Circuit Court of Appeals has regularly not allowed discovery, provided no explanation for Certificates of Scope of Employment and not allowed de novo hearings. (emphasis added)

THE 4TH CIRCUIT COURT OF APPEALS AFFIRMED THE LOWER COURT'S DECISIONS IN THE FOLLOWING CASES WITH UNPUBLISHED OPINIONS.

1] *Dachman* v. *U.S.*, 155 F.3d 558, 558 (4th Cir. (Md.) 1998).

2) *Doyle-Penre* v. *Muhammad*, 229 F.3d 1142, 1142 (4th Cir. (Va.) 2000)

3) *Epley* v. *West*, 168 F.3d 481, 481 (4th Cir. (N.C.) 1998)

4) *Goodwyn* v. *Simons*, 90 Fed. Appx. 680, 2004 WL 332826 (4th Cir.(Va)).

5) *Hoffman* v. *U.S.*, 182 F.3d 907, 907 (4th Cir. (N.C.) 1999)

6] *Merritt* v. *U.S.A. and Meyers and Dorner*, (4th Cir (Va.) Docket No. 04-2003)

7) *Vogrin* v. *U.S.*, 141 F.3d 1162, 1162 (4th Cir. (W.Va.) 1998)

THE 4TH CIRCUIT COURT OF APPEALS AFFIRMED THE LOWER COURT'S DECISIONS IN THE FOLLOWING CASES WITH PUBLISHED OPINIONS.

1. *Borneman v. U.S.*, 213 F.3d 819 (4th Cir. (E.D.N.C.) 2000)

2. *Goldstein v. Moatz*, 364 F.3d 205 (4th Cir. (Va.) 2004)

3. *Gutierrez De Martinez v. Drug Enforcement Admin.*, 111 F.3rd 1148, 1154 (4th Cir.(Va.) 1997)

4. *Maron v. U.S.*, 126 F.3d 317 (4th Cir. (Md.) 1997)

Comments

In all four cases, the 4th Circuit used words that had the effect of the following: The scope-of-employment certification is conclusive unless challenged and is prima facie evidence that defendant federal employee acted within the scope of his employment. This shifts burden to Plaintiff who must prove by a preponderance of evidence that the federal employee was acting outside the scope of his